**BEFORE THE STATE OF NEW JERSEY**
**BOARD OF PUBLIC UTILITIES**

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| **I/M/O THE PETITION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR DECLARATORY RULING CLARIFYING THE COST RESPONSIBILITY FOR NUCLEAR GENERATING ASSET DECOMMISSIONING FUNDS PURSUANT TO *N.J.S.A.* 48:3-49 *et seq.* AND *N.J.S.A.* 52:14B-8** | ) ) ) ) ) ) ) | **BPU DOCKET NO. EO02080610** |

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# INITIAL BRIEF OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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## PRELIMINARY STATEMENT

In the matter now before the Board of Public Utilities ("Board"), Public Service Electric and Gas Company ("PSE&G" or "Company") is attempting to assign to its ratepayers hundreds of millions of dollars in costs associated with the future decommissioning of nuclear generating facilities the Company no longer owns. As a result of electric restructuring proceedings before the Board, PSE&G's nuclear generating units, along with the Company's other electric generation assets were transferred to an unregulated affiliate, PSEG Power, on August 21, 2000. The Board's restructuring Order for PSE&G clearly provided that the risk and responsibility of decommissioning the nuclear units would be transferred to PSEG Power along with the units themselves. Nevertheless, PSE&G is asserting that ratepayers should bear the costs and risks of nuclear decommissioning, not only through the end of the 4-year transition period established under the Electric Discount and Energy Competition Act ("EDECA") but also for decades into the future, until all of the units have been fully decommissioned and their sites returned to "greenfield" conditions. The total amount of this liability is unknown, but has been estimated by PSE&G in the hundreds of millions of dollars. The Ratepayer Advocate submits that this result would be blatantly unfair to PSE&G's ratepayers, who have already been required to shoulder $2.94 billion in "stranded costs," largely attributable to the Company's nuclear generating units.

PSE&G's proposal would also be contrary to one of the key objectives of EDECA–the development of a competitive electric generation market in New Jersey. PSEG Power, unlike its

competitors, could ignore a major cost associated with owning and operating nuclear plants. This result is fundamentally inconsistent with EDECA's objective of lowering the costs of energy by making those costs subject to the forces of competition, and unfair to third party suppliers that would have to compete with an entity being subsidized by PSE&G's ratepayers.

For the reasons set forth in detail below, the Board should order an immediate cessation of ratepayer funding of PSEG Power's decommissioning costs, and declare that all costs and risks associated with PSEG Power's ownership and operation of its nuclear units are its sole responsibility. The Board also should order a refund of PSE&G's over-collections of nuclear decommissioning costs through its SBC. As of August 1, 2003, ratepayers will have paid approximately $87 million of decommissioning costs since the ownership transfer. Furthermore, based on the analyses presented by Ratepayer Advocate witnesses Michael D. Dirmeier and William R. Jacobs, Ph.D., the Company has been over-collecting from customers for many years. Based on these witnesses' analyses, ratepayers are entitled to a refund of $331.497 million (pre-tax) of surplus decommissioning funds.

## BACKGROUND AND PROCEDURAL HISTORY

This proceeding has its origins in the Board's electric restructuring proceeding for PSE&G. *I/M/O Public Service Electric and Gas Company's Unbundling, Stranded Costs and Restructuring Filing,* BPU Docket Nos. EO97070461, EO97070462 and EO97070463. On March 17, 1999, following lengthy hearings and briefing before the Office of Administrative Law and the Board, PSE&G and several other parties, not including the Ratepayer Advocate, submitted to the Board a joint position, referred to as a "Stipulation," ("Stipulation") representing those parties' proposed resolution of the restructuring proceedings. *Id.* (Final Decision and Order dated Aug. 24, 1999), p. 40 (referred to hereinafter as the *"Restructuring Final Order"*). With regard to nuclear decommissioning, paragraph 33 of the Stipulation provided as follows:

> Upon the transfer of the nuclear generation assets, neither Public Service Electric and Gas Company nor its retail customers shall be responsible to decommission its previously owned nuclear units, subject to the Nuclear Regulatory Commission (NRC) approval. That responsibility will pass to the Genco with the transfer of the nuclear generation and associated assets described in Attachment 3 and the Nuclear Decommissioning Trust Funds.

*RA-4*, par. 33, p. 23. Section 5 of the Stipulation established a Societal Benefits Charge Clause ("SBC") for PSE&G, and established an SBC rate which included the $29.6 million in decommissioning costs reflected in the Company's rates as of February 9, 1999. Section 6 of the Stipulation provided that the SBC rate would remain constant through the transition period. *RA-4,* par, 6, p. 5. Section 6 further provided that actual costs incurred by the Company for each SBC cost component would be "subject to deferred accounting," and that, at the completion of the transition

period, the SBC would be "reset and then reset annually upon Board approval to amortize any over- or under-collected balance." *RA-4*, par. 6, p. 6.

On March 29, 1999 several parties including the Ratepayer Advocate submitted their opposition to the proposed Stipulation and submitted an alternative Stipulation ("Alternative Stipulation") for consideration by the Board. *Restructuring Final Order* at 48. The Board, upon consideration of both Stipulations, adopted PSE&G's proposed Stipulation, subject to a number of modifications and conditions. One such condition was to clarify the relationship between Section 33 of the Stipulation, dealing with nuclear decommissioning costs, and the provisions related to the Company's SBC. As stated by the Board:

> In order to ensure that the risk and responsibility of decommissioning is fully transferred to Genco along with the transfer of the assets and the decommissioning trust funds, recognizing that funding for decommissioning will remain in the SBC paid by PSE&G customers, we believe it necessary to place parameters on such continued funding by ratepayers and we shall do so. We therefore, **DIRECT** that, within ninety (90) days of the date of this Order, PSE&G submit to the Board for its approval, a specific proposal a [sic] limit to its financial responsibility for funding, and, in turn, for ratepayers' obligation to fund through the SBC, the cost of decommissioning the nuclear units transferred to Genco.

*Restructuring Final Order*, p. 104. *Id.*

In response to the above directive the Company submitted to the Board a letter dated November 23, 1999 in which it proposed to continue the annual collection of $29.6 million for decommissioning and address "the issue of revenue requirements associated with nuclear decommissioning costs ... at the end of the Company's transition period." *RA-5*, p. 3. This letter was submitted *ex parte*, with no copies provided to the Ratepayer Advocate or any other party to the restructuring proceeding. *Id.*, p. 3. The Board did not initiate any formal or informal proceedings or

issue any Order adopting the Company's proposal to continue the current level of collections for nuclear decommissioning. T307:L11-23.

On June 15, 2001, the Company, in another *ex parte* filing, requested the Board to issue a letter "that confirms [the Board's] intention that the nuclear decommissioning costs collected through the SBC are to be transferred to PSEG Nuclear LLC and deposited into the independent external trust fund." *RA-6,* p. 2. The filing stated that the Company needed the requested letter in order to maintain the tax deductibility of the contributions to the trust fund. *Id.* On October 25, 2001 the Board's Secretary issued a letter to the Company stating that the Board had "authorized the continued collection of $29.6 million in decommissioning costs annually through the utility's Societal Benefits Charge," and that the Board "expects that those funds have been and directs that such funds shall continue to be placed in external Nuclear Decommissioning Trusts ...." *P-14*, BPU Secretary's Letter dated October 25, 2001, p. 2. The Board's action on PSE&G's request was listed on the agenda for the Board's October 25, 2001 open public meeting as "Non Docketed Matter – In the Matter of the Nuclear Decommissioning Trust Funds." *Oct. 25, 2001 BPU Mtg. Agenda,* Item 2.A. Neither the Ratepayer Advocate nor any other party to the restructuring proceedings was given an opportunity to provide input on the Company's request.

On July 22, 2002, the Board issued a procedural Order in connection with the Company's restructuring proceeding, its current base rate proceeding, and other related dockets. *I/M/O the Petition of Public Service Electric and Gas Company for Approval of Changes in its Tariff for Electric Service, Depreciation Rates and for Other Relief*, Docket Nos. ER02050503 *et al.* (Order dated July 22, 2002). The Board's Order noted that the Company's base rate filing "did not address

several directives of the Restructuring or other Board Orders ...." *Id.*, p. 2. One of these was the *Restructuring Final Order's* directive to file a proposal to limit the Company's, and thus its ratepayers' responsibility for decommissioning costs. *Id.* at 5. The Board noted that, in its November 23, 1999 filing the Company had suggested that "the issue of revenue requirements associated with nuclear decommissioning costs" be addressed at the end of the transition period. The Board therefore directed as follows:

> Given the Company's statement and the Board's directive that the SBC be reset at the end of the transition period, the Board HEREBY DIRECTS the Company to file supplemental testimony in the instant proceeding setting forth a more specific proposal for limiting ratepayer funding of decommissioning costs.

*Id.*

The petition and supporting testimony presently before the Board is the Company's response to the above directive. *P-6,* p. 6; T309:L14-24. The Company's petition set forth two alternatives: (1) that ratepayers remain responsible for funding nuclear decommissioning through the SBC, with ratepayers responsible for any funding shortfalls and entitled to any surpluses remaining following decommissioning; or (2) that ratepayers contribute to the decommissioning trust funds through August 1, 2003, at which time decommissioning cost responsibility, along with all interest in the decommissioning trust funds would be transferred to PSEG Power.

On April 11, 2003, in accordance with the procedural schedule established by the Board, the Company submitted its prefiled direct testimony in this matter. Through the testimony of its policy witness, Robert E. Busch, PSE&G asserted that the Company's ratepayers should be required to pay for all of the costs of decommissioning PSE&G's former nuclear units, through the Company's SBC.

The Ratepayer Advocate submitted its prefiled direct testimony of Michael D. Dirmeier and William R. Jacobs. Ph.D. on April 22, 2003. Prefiled rebuttal and surrebuttal testimony were filed, respectively, on May 1 and May 9, 2003. An evidentiary hearing was held before the Commissioners Carol J. Murphy and Jack Alter on May 13 and 14, 2003.

## POINT I

### UNDER THE BOARD-APPROVED STIPULATION IN THE PSE&G RESTRUCTURING PROCEEDING, RATEPAYERS' RESPONSIBILITY FOR FUNDING NUCLEAR DECOMMISSIONING COSTS CEASED AS OF AUGUST 21, 2000, WHEN THE COMPANY'S ELECTRIC GENERATING ASSETS WERE TRANSFERRED TO PSEG POWER.

The outcome of this proceeding turns on the meaning of the Stipulation and *Restructuring Final Order*. PSE&G's position, as presented through the testimony of its policy witness, Robert E. Busch, is that these documents contemplate continued ratepayer funding for decommissioning costs until the Company's former nuclear units are retired and the process of decommissioning is completed. *P-6*, pp. 6-7; T258L:15 - T259:L15. According to the Company's position, ratepayers would be responsible for "whatever the ultimate cost is." T259:L25 - T260:L1. Ratepayers would bear all of the financial risks associated with decommissioning, including any increases in the costs of decommissioning and any increased funding requirements resulting from a premature shutdown of any of the units. *P-6*, pp. 9-10; T259:L16 - T261:L9.

The Ratepayer Advocate respectfully submits that PSE&G's interpretation is contrary to the explicit language of the Stipulation and *Restructuring Final Order*, and inconsistent with EDECA's objective of creating effective competition in New Jersey's electric generation market. As explained in detail below, the Stipulation and *Restructuring Final Order* clearly provided that ratepayers' financial responsibility for decommissioning costs ceased as of August 21, 2000 when PSE&G's electric generation assets were transferred to PSEG Power. Contrary to PSE&G's arguments, this result is consistent with New Jersey energy policy as expressed in EDECA and other Orders of the Board.

### A. The Stipulation Provided for the Transfer of Financial Responsibility for Nuclear Decommissioning Costs Along with the Nuclear Units.

As noted in the Background and Procedural History section above, section 33 of the Stipulation specifically addressed responsibility for decommissioning costs. This provision stated clearly and unequivocally that, subject only to NRC approval, "neither PSE&G nor its retail customers shall be responsible to decommission its previously owned nuclear units" after the transfer of the nuclear generating assets to PSEG Power. This clear expression of intent is consistent with other provisions in the Stipulation. Paragraph 19 provided for the transfer of the Company's "electric generation-related assets and the operation, and all associated rights and liabilities" to an unregulated affiliate. *RA-4*, par. 19, p. 14 (emphasis added). Paragraph 27 provided for the transfer of certain contracts to the unregulated affiliate, for the expressed purpose of "ensur[ing] that Public Service does not retain any risks or liabilities associated with the electric generating business ...." *RA-4*, par. 27, pp. 19-20. There is no language anywhere in the Stipulation stating that the significant liabilities associated with nuclear decommissioning were to remain with ratepayers.

The Company argues that paragraph 5 of the Stipulation, which included decommissioning costs as a component of the Company's SBC, reflected an intent to continue ratepayer funding of decommissioning costs through the SBC indefinitely. *P-6*, pp. 3-4; T292L:21 - T293:L5. This argument is based on an incomplete reading of the Stipulation's provisions relating to the Company's SBC. Mirroring the EDECA section which discussed the components of the SBC, Section 5 established the Company's SBC and provided that it would include five types of costs (1) the costs of social programs, (2) nuclear decommissioning costs, (3) demand-side management costs, (4) manufactured gas plant

remediation costs, and (5) consumer education costs. *RA-4*, par. 5, p. 5, *N.J.S.A.* 48:3-60. This section must be read in conjunction with Paragraph 6 of the Stipulation, which addressed the SBC rate to be in effect during the transition period. Paragraph 6 stated that the SBC would be "set at the level of costs for the above items included in rates as of February 9, 1999," and would "remain constant through the Transition Period." However, "[a]ctual costs incurred by the Company for each of the cost components enumerated in paragraph 5 [would] be subject to deferred accounting, " and, at end of the transition period, the SBC would be "reset and then reset annually upon Board approval to amortize any over- or under-collected balances." *RA-4,* par. 6, pp. 5-6.

These provisions established an SBC rate to be in effect during the Transition Period, but not the amount of ratepayers' ultimate liability for the costs included in the SBC, which was subject to deferred accounting and true-up at the end of the transition period. *RA-10,* p. 8. As Mr. Dirmeier explained during his cross-examination, the $29.6 million in decommissioning costs included in the SBC "is a collection – it's a rate but it's a collection in excess of the amounts for which customers would be responsible for decommissioning." T467:L8-10.

PSE&G also relies on Attachment 3 to the Stipulation, which includes, as part of the list of "Generation Related Assets" to be transferred to the unregulated affiliate, "Future Societal Benefits receivable (Account 130) for nuclear decommissioning pursuant to Section 12(a) of the Act." T390:L14-19; *RA-4,* Attachment 3, p. 2 of 2. This provision, however, says nothing about how long such SBC collections will continue, and it is limited to those costs allowed by the Board "pursuant to Section 12(a)(2) of the Act." Thus, this provision did not create a right to decommissioning costs when,

under other specific provisions in the Stipulation, ratepayer responsibility for these costs ended at the time of the asset transfer.

The Company argues further that the intent of the Stipulation was to transfer the physical responsibility for decommissioning to PSEG Power, while "funding for decommissioning remained in the SBC, paid by PSE&G customers." *P-6*, pp. 6-7; *P-7*, pp. 8-9. This interpretation is not supported by any language in the Stipulation. Section 33 of the Stipulation, which, as noted, provided that "neither PSE&G nor its retail customers shall be responsible to decommission its previously owned nuclear units," following the asset transfer, did not make any such distinction.

Moreover, PSE&G's argument is inconsistent with any common-sense interpretation of the Stipulation. As explained by Ratepayer Advocate witness Mr. Dirmeier, "[i]t is difficult to envision that the stipulation, in holding ratepayers not responsible for decommissioning, meant that ratepayers would not have to go collectively to the plants and assist in their dismantling." *RA-10*, pp. 12-13. In other words, "responsibility" for decommissioning means nothing if it does not mean economic responsibility. *Id.*

During cross-examination, PSE&G's own policy witness, Mr. Busch, recognized the practical impossibility of separating the responsibility to decommission from the responsibility to pay the costs of decommissioning. When Mr. Busch was asked to clarify the scope of ratepayers' obligations under the Company's interpretation of the Stipulation, he testified as follows:

> Q. You're not arguing that ratepayers have any obligation other than the obligation to pay what is required to fund the nuclear decommissioning trust funds, are you?

A. Yes, the requirement that is generated is for decommissioning and the funds go into the trust. You can't – I'm not sure, maybe I just don't understand your question, but you can't separate the two. I mean, why else in the world would people provide $30 million a year to a trust? It's to decommission those plants.

Q. The ratepayer obligation that you are arguing for is to fund these trusts, is that correct?

A. No, I don't think that is correct. I think that's a simplification. I think the obligation is to decommission the power plants. The act of funding the trusts is part and parcel of that obligation.

T301:L22 - T302:L15. Thus, Mr. Busch acknowledged that the Company's position would obligate ratepayers to "decommission the power plants," precisely the obligation that the Stipulation required to be transferred to PSEG Power.

Mr. Busch's assertion that continued ratepayer funding of decommissioning costs was "assumed" by the parties to the restructuring proceeding should likewise be rejected. Mr. Busch's rebuttal testimony states that, "the Company and intervenors assumed that all nuclear decommissioning costs ... would remain the responsibility of utility customers." *P-7,* p. 6. In support of this statement, Busch cites the testimony of only two witnesses: Mr. Colin Loxley on behalf of the Company and Mr. William B. Marcus on behalf of the New Jersey Public Interest Intervenors. *Id.* p. 6, n. 2. Both of the cited pieces of testimony were filed in 1997, before the enactment of EDECA, before PSE&G had proposed divestiture of its electric generation assets, and before the intensive negotiations that led to the Stipulation. T328:L12-18; T330:L24 - T331:L2. The positions taken by two parties early in the restructuring proceeding have been superseded by the many developments that have occurred since that time.

Moreover, the testimony of Mr. Marcus, which is cited as evidence of the intervenors' agreement with Mr. Loxley's testimony on decommissioning costs, in fact reflected substantial disagreement with PSE&G's overall conclusions about the value of its nuclear generating units. Mr. Marcus's testimony included a detailed critique of the Company's analysis of the market value of its nuclear assets, and contended that the Company's proposed level of stranded cost recovery for its nuclear units was grossly excessive. *RA-7,* pp.33-55. Furthermore, Mr. Marcus testified that some decommissioning costs should be borne by the Company. *RA-7,* pp. 58-61. Thus, while Mr. Marcus agreed in part with the Company's proposal on decommissioning costs, this was in the context of an overall position that strongly disagreed with the Company's evaluation of its nuclear assets and related stranded cost recovery proposal.

In an apparent attempt to suggest that the Ratepayer Advocate acquiesced in the Company's proposal for continued ratepayer funding of decommissioning, Mr. Busch states that the Alternative Stipulation submitted in the Company's restructuring proceedings by the Ratepayer Advocate "incorporate[d] the Company's SBC recommendations." *P-7,* p. 8. As noted above, the Stipulation's provisions concerning the SBC established only the SBC rate, not ratepayers' ultimate responsibility for decommissioning costs. Furthermore, the Alternative Stipulation reflected a substantially lower level of stranded cost recovery, and contemplated divestiture only subject to a number of conditions. *RA-8,* Attachment A, pp. 2-4. Thus, the Alternative Stipulation did not include indefinite ratepayer responsibility for nuclear decommissioning, and certainly did not express agreement with the position that ratepayers should bear such responsibility in addition to the high level of stranded cost recovery reflected in the Stipulation.

The only reasonable interpretation of the Stipulation is that it was intended to transfer the financial responsibility for nuclear decommissioning to PSEG Power along with the ownership of the nuclear units. PSE&G's arguments to the contrary should be rejected.

### B. The *Restructuring Final Order* Confirmed that Ratepayer Responsibility for Nuclear Decommission Would Cease With the Transfer of the Nuclear Units.

The Board's *Restructuring Final Order* confirmed that all ratepayer responsibility for nuclear decommissioning costs would end with the transfer of the former PSE&G nuclear units to PSEG Power. The Board's description of the terms of the Stipulation, as well as paragraphs setting forth the terms of the Board's Order, included paragraph 33, which provided that ratepayers would no longer be responsible for decommissioning after the transfer, and paragraph 6, which provided that the decommissioning and other costs included in the Company's SBC would be subject to deferred accounting and true-up at the end of the transition period. *Restructuring Final Order* at 41, 47, 116, 124.

As a further indication of the Board's intent, proposed transfer of the costs and risks of decommissioning was cited as one of the key factors supporting the Board's approval of the proposed transfer. One of the fundamental issues addressed in the PSE&G restructuring proceeding was whether the Stipulation reflected a sufficiently high value for the assets to be transferred to an unregulated affiliate. Thus, the *Restructuring Final Order*, at pages 100 through 103, included a detailed analysis and findings concerning the value of the Company's fossil and nuclear generating assets. Based on these findings, the Board determined that PSE&G would be provided with the opportunity to recover $2.94 billion in stranded costs. *Id.* at 102.

Following that discussion, the Board addressed the reasonableness of the transaction as a whole:

> Additionally, for the foregoing reasons, including the use of the generating assets by Genco to provide BGS at a fixed price over the Transition Period, the removal of operational risk from ratepayers, the removal of nuclear plant decommissioning responsibility and attendant risks, the maintaining of the capacity associated with the transferred generation as a capacity resource for the duration of the Transition Period, and the receipt by PSE&G of full market value for the assets, we **FIND** that the transfer, subject to the terms herein, is in the public interest and will not jeopardize system reliability.

*Id.* at 103 (emphasis supplied). Thus, the Company's recovery of $2.94 billion in stranded costs was reasonable only because it was balanced by other significant economic factors including the "removal of nuclear plant decommissioning responsibility and attendant risks." This discussion made it clear that the transfer of the economic responsibility for decommissioning from ratepayers to PSEG Power was considered by the Board to be one of the essential provisions of the Stipulation.

With regard to the Company's SBC, the *Restructuring Final Order* recognized the need to reconcile the level of PSE&G's SBC collections with the cessation of ratepayer responsibility for decommissioning costs upon the transfer of the Company's nuclear units. As noted above, the *Restructuring Final Order* stated at page 104 that the Board, while "recognizing that the funding for decommissioning will remain in the SBC," wished to "ensure that the risk and responsibility of decommissioning is fully transferred to Genco along with the transfer of the assets and the decommissioning trust funds ...." For this reason the Board directed the Company to submit a "specific proposal [to] limit ... its financial responsibility for funding, and, in turn for ratepayers' obligation to fund

through the SBC, the cost of decommissioning the nuclear units transferred to Genco" to limit the responsibility of the Company and its ratepayers to fund decommissioning costs. *Id.* at 104.

Mr. Busch's responses to questions from the Board's advising Deputy Attorney General support the conclusion that, when the Board referred to a transfer of the "risk and responsibility of decommissioning," it intended to transfer the economic responsibility of decommissioning. Specifically, when Mr. Busch was asked to define the term "decommissioning risk," he responded as follows:

> A. It means you are facing a very large, very hard to estimate absolute obligation by your firm many years from now which represent obligations so great you have no choice but to save now for the future.

T386:L23 - T387:L4. Thus, Mr. Busch acknowledged that "decommissioning risk" is inseparable from the obligation to contribute funding for future decommissioning costs. This testimony confirms that the plain meaning of the *Restructuring Final Order*, which referred to both the "responsibility" and "risk" of decommissioning, was to transfer the financial obligations along with the physical. PSE&G's argument to the contrary should be rejected.

The Ratepayer Advocate believes that, when the Board directed PSE&G to file a proposal to limit the Company's and its ratepayers' responsibility for decommissioning, the Board contemplated a proposal to modify SBC collections, accounting, or both, to assure that ratepayers' ultimate liability would reflect the cessation of responsibility for decommissioning costs as of the time the nuclear units were transferred to PSEG Power. As noted in the Background and Procedural History section above, PSE&G's response to the Board's directive was an *ex parte* letter, dated November 23, 1999, in which the Company proposed to continue its SBC collections at the current level and defer consideration of "revenue requirements associated with decommissioning costs" until the end of the

transition period. *RA-5,* pp. 2-3. As acknowledged by PSE&G witness Mr. Busch, the Board took no action on the Company's letter. T307:L11-23.

As a result of the above developments, the Board did not establish limits on ratepayer funding of decommissioning during the transition period, as contemplated in the *Restructuring Final Order*. However, this did not change the Board's determination that ratepayer responsibility for decommissioning should have ceased simultaneously with the transfer of the nuclear units to PSEG Power. It was PSE&G's choice to continue decommissioning costs in its SBC collections while deferring the Board's determination of how to reconcile the SBC collections with ratepayers' ultimate liability. Thus, the Company continued its SBC collections at its own risk, and subject to the Board's continuing authority to implement a key economic provision of its *Restructuring Final Order*.

The parties' rights under the *Restructuring Final Order* also were not changed as a result of the letter issued by the Board's Secretary on October 25, 2001. As noted in the Background and Procedural History section above, on June 15, 2001 the Company made an *ex parte* request for the Board to issue, for tax purposes, a letter "that confirms [the Board's] intention that the nuclear decommissioning costs collected through the SBC are to be transferred to PSEG Nuclear LLC and deposited into the independent external trust fund." *RA-6,* p. 2. In response to this request, the Board issued a letter dated October 25, 2001 in which it stated that the Board had "authorized the continued collection of $29.6M in decommissioning costs through the utility's Societal Benefits Clause," and that the Board "expects that those funds have been and directs that such funds continue to be placed" in the nuclear decommissioning trust funds. *P-14*, BPU Secretary's Letter dated October 25, 2001, p. 2. Mr. Busch argues in his prefiled rebuttal testimony, and during cross-examination, that this letter is evidence

of the Board's intent to continue ratepayer funding of decommissioning throughout the transition period, and thereafter on a long-term basis. *P-7*, p. 10; T312:L9 - T313:L8.

Contrary to Mr. Busch's argument, the Board's October 25, 2001 letter did not alter ratepayers' clearly stated rights under the *Restructuring Final Order*. The *Restructuring Final Order* was issued following a lengthy proceeding, involving numerous parties with significant financial interests in the outcome of the proceeding. Those parties had the right to rely on provisions in the Order. Thus, the Board could not have taken any action affecting those interests unless PSE&G had followed the proper procedures for modifying a Board Order. Those procedures included the filing of a motion with "appropriate notice" to "all other parties, or their attorneys of record, by service of a copy of the motion for reopening." *N.J.A.C.* 14:1-8.5 (a). PSE&G did not follow this procedure when it submitted its *ex parte* request to the Board on June 15, 2001. Further, as noted above, the only public notice of the Board's consideration of the Company's request appears to have been the listing of this item on one of its agendas as "Non Docketed Matter – In the Matter of the Nuclear Decommissioning Trust Funds." *Oct. 25, 2001 BPU Mtg. Agenda*, Item 2.A. This notice gave no indication that this matter would affect the interests of the parties to the PSE&G restructuring proceeding, or that it involved PSE&G specifically. Since PSE&G did not follow the proper procedure for modifying a Board Order, it cannot rely on the October 25, 2001 Secretary's letter as affecting the rights of ratepayers or any other parties to the restructuring proceeding.

Moreover, Mr. Busch's testimony concerning intent of the Board's October 25 letter is contrary to materials provided in PSE&G's responses to discovery. During cross-examination, Mr.

Busch testified that this letter was intended to communicate to the IRS that PSE&G had the authority to hold ratepayers responsible for decommissioning costs indefinitely:

> Q. Is there anything in this letter that says how long the collection of decommissioning costs in the SBC will continue?
>
> A. You have to give me a minute to read this.
>
> There is nothing that I see immediately upon a brief reading that limits the period of time the funds would be collected.
>
> Q. Is there any representation in this letter that SBC funding will continue as long as the plants are in service and then until decommissioning is completed?
>
> A. There's no specific representation, but as a consequence of the regulations associated with the IRS, that in essence is what's underlying this letter. Without that, the IRS would have potentially revoked the qualified status of the fund.
>
> Q. Are you saying that it's your interpretation of this letter that what the board intended to say was that the funding would continue until the decommissioning is completed?
>
> A. Yes, As a matter of fact, were the board not to say that, the IRS would not have ruled that the funds were qualified.
>
> Q. So, for instance, if the board had meant that the collection is proceeding now, it might terminate as of a certain date, would that have caused the IRS to disqualify the fund –
>
> A. Yes.
>
> Q. – the fact that the funding would cutoff [at] a certain date?
>
> A. Yes.

T312:L1 - T313:L8. However, based on PSE&G's discovery responses, there was no representation to the IRS, and the IRS did not understand, that the Board had authorized indefinite ratepayer

responsibility for decommissioning costs. According to correspondence from the IRS related to each of the former PSE&G generating units, PSEG Nuclear represented that it would continue to collect decommissioning costs in rates "until at least i" with "i" defined as "July 31, 2003." *P-9,* RAR-DECOM-5, pp. 4, 6, 13, 15, 22, 24, 31, 33, 40, 42. Without conceding that the Board's October 25, 2001 letter has any bearing on the interpretation of the *Restructuring Final Order,* the Ratepayer Advocate notes that Mr. Busch's testimony is contrary to the IRS's stated understanding of PSEG Nuclear's representations to the IRS. According to the IRS, the Company did not represent that it had authority to recover decommissioning costs from ratepayers indefinitely, and the IRS did not rely on such an interpretation in issuing its determinations to PSEG Nuclear. Since Mr. Busch's testimony is directly contrary to PSE&G's discovery materials, his testimony concerning the intent of the Board's letter should be given no weight.

The *Restructuring Final Order* clearly expressed the Board's intent to terminate ratepayer responsibility for decommissioning as of the time PSE&G's former nuclear units were transferred to PSEG Power. This key element of the Board's decision was not changed as a result of subsequent actions of PSE&G and the Board. PSE&G's arguments to the contrary should be rejected.

### C. The Transfer of the Costs and Risks of Decommissioning to PSEG Power is Consistent With New Jersey Energy Policy as Stated in EDECA.

Under EDECA, it is a policy of this State to "[p]lace greater reliance on competitive markets, where such markets exist, to deliver energy services to consumers in greater variety and at lower cost

than traditional, bundled, utility services." *N.J.S.A.* 48:3-50 (a)(2). It was in furtherance of this policy that the Board was authorized to "permit competition in the electric generation ... marketplace ...." *N.J.S.A.* 48:3-50(c)(1).

As explained by Ratepayer Advocate witness Michael Dirmeier, in order for the competitive market to function properly to provide greater variety to consumers at lower costs, all costs associated with electric generation must be factors in the economic decisions made by the owners of generation facilities. *RA-10,* pp. 10-11. As an example, "if the cost of decommissioning a plant is growing more slowly than the earnings on a decommissioning fund," this is a factor which would favor extending the life of a plant. However, if this cost does not have to be considered, "the potential for making an erroneous economic decision increases dramatically." *Id.* p. 11.

PSE&G appeared to recognize the importance of this objective in the March 17, 1999 cover letter in which PSE&G and the other signatories to the Stipulation urged its adoption by the Board. The letter stated, at page 3, that the Company will "transfer all of its generating assets and liabilities out of the utility and into an unregulated company," and that "this separation of generation from the utility will establish a framework for ensuring a level playing field for all other generators who will be offering generation services in New Jersey or within PJM." *RA-3,* p. 3.

PSE&G's current proposal is fundamentally opposed to the creation of a level competitive playing field. As Mr. Dirmeier explained, "[i]f nuclear decommissioning is not a cost to PSEG [Power],[1] which is a competitor in the energy markets, then PSEG [Power] is given a significant competitive

[1] Mr. Dirmeier's testimony refers to Public Service Enterprise Group ("PSEG"), which competes in the electric generation market through its subsidiary PSEG Power. T254:L1-21.

advantage because it can ignore a major cost associated with the provision of its nuclear capacity and energy." *RA-10,* p. 11. This would be unfair to both PSEG Power's competitors, and to PSE&G's ratepayers, who no longer have any rights to receive the output from the former PSE&G nuclear units. *Id.* As Mr. Dirmeier observed, "[s]urely PSEG [Power] would complain bitterly if the Board were to propose ratepayer funding of environmental costs imposed on the coal plants of PSEG [Power]'s competitors." *Id.* PSE&G's proposal to continue ratepayer funding of decommissioning costs would be equally unfair and disruptive to the functioning of New Jersey's electric generation marketplace.

The Ratepayer Advocate notes that the Legislature sought to avoid just this kind of unfair cross-subsidization under section 7 of EDECA. Specifically, EDECA section 7(h) prohibits an electric utility from cross-subsidizing competitive services provided by an affiliate, or reflecting the costs of competitive services in the rates of its regulated rate customers. Further, utilities are required to maintain a "strict separation" between the utility's "revenues, costs, assets, risks, and functions" and those of the affiliate. *N.J.S.A.* 48:3-55(h). The Company's proposal is contrary to this important provision of EDECA.

PSE&G's current proposal also would defeat the purpose of relying on competition, rather than regulation, to control the costs of electricity. *N.J.S.A.* 48:3-50 (a)(2). According to PSE&G witness Mr. Busch, under the Company's proposal the Board would remain involved in reviewing the prudency of nuclear decommissioning costs for many years into the future, until all of the Company's former nuclear units are completely decommissioned. T369:L22 - T370:L6. The Ratepayer Advocate does not believe that this result was intended under the Stipulation or the Board's *Restructuring Final Order.*

Contrary to the Company's arguments, there is no State policy which requires ratepayers to remain financially responsible for decommissioning divested nuclear units. The Company's efforts to find such a policy are based on a document that was superseded with the enactment of EDECA, and contrary to EDECA and the Board's Orders concerning two other divestitures of nuclear assets.

The Company argues that continued ratepayer funding for decommissioning is required as a matter of State policy under the Board's April 1997 report entitled *Restructuring the Electric Power Industry in New Jersey, Findings and Recommendations*, known as the "Green Book." *P-6*, pp. 7-8; *P-7,* pp. 4-6. The language from the Green Book quoted in Mr. Busch's testimony does, as he asserts, reflect an assumption that ratepayers should remain responsible for decommissioning. *Id.* However, as Mr. Busch acknowledged during cross-examination by the Board's advising Deputy Attorney General, the Green Book "contained the policy findings and recommendations of the board in 1997 to the Governor and to the Legislature." T382:L2-6. Further, Mr. Busch acknowledged that the Green Book was referring to nuclear power plants owned by the utilities, and that it contained "no substantial discussion" of divestiture. T382:L18 - T384:L2. Thus, the Green Book has little relevance to the interpretation of the Stipulation, a proposal that contemplated divestiture, and was submitted to and approved by the Board after the enactment of EDECA.

Although Mr. Busch argues that EDECA, contains language "strikingly similar" to that used in the Green Book with regard to nuclear decommissioning costs, the language is, in fact, strikingly different. As Mr. Dirmeier observed in his prefiled surrebuttal testimony, Section 12(a) of EDECA authorized the Board to permit each electric utility to recover "some or all" of an enumerated list of five categories of costs, including decommissioning costs. *RA-11,* pp. 7-8; *N.J.S.A.* 48:3-60(a). This

language does not state that the Board must allow all or part of any one of the five categories of costs, including decommissioning; it states that the Board should allow "some or all" such costs, as appropriate. *Id.* Surely PSE&G would not argue that a company such as Rockland Electric Company, which has no liability for manufactured gas plant remediation costs, should be permitted to recover such costs as part of its SBC under EDECA section 12(a)(4). Similarly, the Board is not required to include nuclear decommissioning costs in the rates of a utility that no longer has any responsibility for nuclear decommissioning.

The Ratepayer Advocate notes that ratepayers have not been left with unlimited liability for decommissioning the nuclear facilities formerly owned by two other New Jersey electric utilities. As noted in Mr. Dirmeier's prefiled direct testimony, Atlantic City Electric Company's ratepayers are no longer paying nuclear decommissioning costs. The Board's Decision and Order authorizing the sale to PSEG Power states:

> As indicated above, the purchasers will assume all future nuclear decommissioning risk and future nuclear decommissioning costs for these nuclear facilities, whereas of the closing of this sale, [Atlantic's] ratepayers will no longer be responsible for nuclear decommissioning costs in their rates.

*I/M/O the Petition of Atlantic City Electric Company Regarding the Sale of Nuclear Assets*, BPU Docket No. EM99110870 (Decision and Order dated July 21, 2000), p. 21. PSE&G has acknowledged in its discovery responses that PSEG Power has no recourse for decommissioning costs beyond the amounts contained in the trust funds when they were transferred to PSE&G. *RA-10,* p. 13; *P-9*, RAR-DECOM-31.

JCP&L's customers are continuing to contribute to the decommissioning trust funds for the former JCP&L nuclear units, but only up to a specified dollar amount. As stated in the summary Board Order approving the divestiture of JCP&L's nuclear units, the Asset Purchase Agreement for these units provided that JCP&L and its affiliates would fund the nuclear decommissioning trusts "up to a maximum of $320 million, of which [JCP&L's] share is $80 million." *I/M/O Jersey Central Power & Light Company d/b/a GPU Energy*, 1999 WL 1581582 (NJBPU 1999), *P-17,* p. 2. Unlike PSE&G's proposal, this funding obligation was arrived at based on arms-length negotiations between unaffiliated parties, and it does not insulate the current owners of the facilities from the costs and risks of nuclear decommissioning.

New Jersey energy policy, as reflected in EDECA, supports the Ratepayer Advocate's proposal to terminate ratepayer funding of decommissioning costs for the former PSE&G nuclear units as of the time these units were transferred to PSEG Power. There is no State policy requiring ratepayers to bear this responsibility indefinitely, as argued by PSE&G.

## POINT II

**THE BOARD SHOULD REJECT PSE&G'S SITE-SPECIFIC DECOMMISSIONING COST ESTIMATES DATED DECEMBER 2002 BECAUSE THEY OVERSTATE THE DECOMMISSIONING COSTS BY INCLUDING ACTIVITIES THAT ARE NOT REQUIRED BY THE NRC FOR LICENSE TERMINATION, AND ARE UNLIKELY TO OCCUR AND CONTAIN LARGE CONTINGENCY COSTS THAT ARE SPECULATIVE AND MIGHT NOT EVER BY SPENT.**

PSE&G proposes to use a site-specific decommissioning study as its estimate for decommissioning costs. *P-2*, p. 9, l. 15-22; *P-3*, p. 19, l. 6-9. The Company's witness, Mr. Thomas S. LaGuardia, presented these studies to support his recommendation that the decommissioning costs for the Hope Creek, Salem, and Peach Bottom nuclear stations should be $783.1 million, $1,154.6 million, and $1,294.1 million, respectively. *Id*. However, the Ratepayer Advocate's witness, Dr. Jacobs, conclusively showed that these estimates are largely overstated.

As Dr. Jacobs testified, PSE&G's estimates include activities not required by the NRC for license termination. These activities include demolition and removal of non-nuclear portions of the plant and returning the plant site to a "Greenfield" condition, approximating the condition of the site before the plants were built. *RA*-1, p. 10, l. 4-10. Furthermore, the availability of scarce transmission and cooling water resources at the nuclear generation sites makes it highly unlikely these sites will be returned to a Greenfield condition. The sites will continue to be used as locations for electric generating facilities for the foreseeable future. Dr. Jacobs calculated that the costs included in the Company's 2002 site-specific decommissioning cost estimate for the Company's former regulated share of

activities not required by the NRC for license termination amount to more than $390 million. *Id*., p. 10, l. 7-13.

In addition to these cost overstatements for activities that are not required for license termination, PSE&G's site-specific estimates also include large contingency allowances that are speculative and may never be incurred. The estimates apply contingencies from 10% to 75% to individual activities with the average contingency of approximately 16% for the five nuclear units. For many activities, the assumed contingency is the single largest cost associated with the activity. The contingency-related costs included in the decommissioning cost estimate for PSE&G's former regulated share of the nuclear units total more than $280 million. *Id*., p. 10, l. 14 to p. 11, l. 1. These costs are included for unknown events that may never occur many years from now and, as such, are too speculative to be considered for ratemaking purposes here. The Ratepayer Advocate urges the Board to reject those overstated estimates and adopt the recommendations of our witness, Dr. Jacobs, as outlined below.

These nuclear plants will not be decommissioned until ten to forty years or more in the future. As stated by Dr. Jacobs, developing estimated decommissioning costs based on today's technology and today's experience is, at best, a rough estimate. *Id*., p. 11, l. 3-5.

Dr. Jacobs also testified that recent improvements in nuclear power plant operating performance and reduced refueling outage durations demonstrate the dramatic improvements that are achievable as the industry gains experience and improves technology to perform specific tasks. Some of the areas of likely cost reduction in the future include project management, waste disposal and spent fuel storage. It would be unreasonable to charge ratepayers over $280 million for activities that cannot

be specifically identified and known. Even though some activities may cost more than planned, other activities likely will cost less than planned, based on greater experience that the industry will have when PSEG Power's nuclear units are decommissioned . The cost and duration of actual decommissioning activities many years from now will likely bear little resemblance to the activities described in the site-specific studies. For these reasons, it is unreasonable and inappropriate to request today's ratepayers to fund unknown, unspecified activities that may never occur. *Id*., p. 11, l. 6-16; p. 13, l. 4 to p. 14, l. 14. Also, the current $29.58 million annual funding amount was based on PSE&G's removal of contingency costs in its 1991 base rate case. *Id*., p. 11, l. 17-19. That case was resolved by stipulation, and therefore, even PSE&G admitted that the contingencies are unnecessary to set just and reasonable rates for decommissioning. For these reasons, the Board should not permit the Company to inflate its estimates in this proceeding.

## POINT III

### THE BOARD SHOULD ADOPT THE NRC MINIMUM DECOMMISSIONING COST ESTIMATES AS THE BASIS FOR ESTIMATING FUTURE NUCLEAR DECOMMISSIONING COSTS BECAUSE THEY ARE MORE REASONABLE THAN PSE&G'S ESTIMATES.

The only reasonable estimate for nuclear decommissioning in the record before the Board is that contained in Dr. Jacobs' testimony, *i.e.*, the NRC minimum decommissioning cost estimate method. Dr. Jacobs described this method:

> The NRC requirements for funding nuclear decommissioning are found in 10 CFR 50.75. The NRC regulations provide a formula for estimating nuclear decommissioning costs based on the size and type of nuclear power plant. The formula is based on a base year of 1986 and applies escalation factors to account for escalation of labor charges (L), energy costs (E), and waste burial charges (B). The equation is:
>
> Estimated Cost (Year 19XX) = 1986 Cost *[.65L +.13E +.22B].
>
> The escalation factors for labor and energy are taken from regional data of the U.S. Department of Labor Bureau of Labor Statistics and the waste burial escalation factor is taken from NRC report NUREG-1307, "Report on Waste Burial Charges."

*RA-1*, p. 6, l. 12 to p. 7, l. 2.

The NRC method for estimating decommissioning costs provides the following results for the former PSE&G nuclear units (in 2002 dollars): Hope Creek -- $417.480 million; Peach Bottom 2 -- $191.581 million; Peach Bottom 3 -- $191.581 million; Salem 1 -- $153.466 million; and Salem 2 -- $153.466 million. *P-3*, p. 17, l. 13-17. The NRC rule provides a cost estimating method by which a licensee gives the agency reasonable assurance that funds will be available for decommissioning.

PSE&G does not question the reasonableness of the federal regulation. Therefore, the Board should also find reasonable assurance that using the NRC method will demonstrate how much funding needs to be available for decommissioning when that decommissioning occurs. PSE&G's proposal would seriously overcharge the utility ratepayers and unfairly deprive them of the full refund for overpayment that is due to them.

### A. The Board Should Adopt The Estimated Probabilities Of Plant Operating License Life Extensions As Reasonable For Calculating The Required Decommissioning Funding.

Dr. Jacobs also stated that the expected twenty-year life extension of the nuclear plants will have a significant impact on the required decommissioning funding. *RA-1*, p. 14, l. 17-22. PSE&G has stated that the need to continue charging ratepayers for decommissioning "would be greatly diminished or eliminated if 20-year extensions were granted to each of these units." RAR-DECOM-40; *RA-1*, p. 17, l. 8-17. As was seen during the evidentiary hearings, the two Peach Bottom units have indeed received twenty-year extensions on their operating licenses from the NRC. The original probability of license extension for Peach Bottom provided by PSE&G was 80%. *RA*-1, p. 16, Table 3. That probability is now a certainty and the 80% is now obviously 100% for purposes of calculating the decommissioning funding.

PSE&G also provided the following probabilities of license extension for the other nuclear units: Hope Creek – 70%; and Salem – 50%. *Id*. Dr. Jacobs provided data on the current status of license extension proceedings before the NRC. *RA-1*, p. 15, l. 18 to p. 16, l. 10. Based on these results, Dr. Jacobs concluded that "that many nuclear plant owners will apply for and be granted license renewal as the term of the original operating license comes to an end." *Id*. For the above reasons, the Ratepayer

Advocate urges the Board to adopt the estimated probabilities of plant operating life extensions as reasonable for the purpose of calculating the required decommissioning funding.

## POINT IV

### AS OF AUGUST 1, 2003, THE BOARD SHOULD ORDER PSE&G TO REFUND $331.497 MILLION TO RATEPAYERS TO RETURN THE SURPLUS DECOMMISSIONING FUNDING.

As stated above, the Board has previously determined that ratepayer funding of nuclear decommissioning should end when the utility's former nuclear units were transferred to PSEG Power. However, because PSE&G ratepayers have continued to pay the annual $29.58 million to the SBC since August 1, 1999 and while this proceeding to place the final parameters on ratepayer funding is open, it is now necessary to fix the amount of the refund that belongs to the ratepayers. The amount of the refund will be determined as of August 1, 2003, since that is the date when the SBC rates will be reset and the Transition Period will end.

The Ratepayer Advocate witness, Mr. Dirmeier, has determined that there is already a $321.637 million surplus in the decommissioning trust funds as of March 31, 2003.[2] That amount should be part of the refund to ratepayers. The other part of the refund to ratepayers will come from the ratepayer payments to the SBC for nuclear decommissioning from April 1, 2003 through the end of the Transition Period on July 31, 2003. The Board previously determined that PSE&G electric ratepayers would continue to pay $29.58 million per year for decommissioning until the nuclear units were transferred to PSEG Power.[3] There will be four months from the March 31, 2003 date for calculating the funds' surplus until July 31, 2003. Four months of the annual $29.58 million will be $9.860 million.[4] Therefore, the total refund to electric ratepayers will be $331.497 million ($321.637

[2] Transcript request 468.
[3] *RA-10*, p.10, note 4.
[4] $29.58 million x 4/12 = $9.860 million

million + $9.860 million). The Ratepayer Advocate urges the Board to order this refund to begin as of August 1, 2003, and that the Board also adopt Mr. Dirmeier's recommendation to amortize the refund to customers as a reduction in rates over a period to be determined by the Board in connection with PSE&G's overcollection in the deferred balances proceeding.[5]

The existence of the surplus in the funds is supported not only by the reduced decommissioning cost estimates provided by the NRC method and by Dr. Jacobs' testimony, but also by the changing estimates for the decommissioning expense over time. That is to say, partly because earlier estimates of necessary decommissioning funding have been shown to be too high and the electric rates at those times were set by the Board based on estimates that turned out to be excessive, the funds contain an excess compared to what should have been collected through that time. For instance, the decommissioning funding for Salem 1 was set by the Board in PSE&G's 1991 base rate case[6] in an amount that is higher than the amount that is now estimated to be needed.[7] Accordingly, the fund balance for Salem 1 now contains a surplus. Mr. Dirmeier made similar calculations for the other nuclear units.

Other reasons for the existence of the surplus are that because of greater experience with fund earnings since the 1991 rate case and a significant reduction in cost escalation rates since the early 1990's, the estimated fund earning rate exceeds the cost escalation rate, leading to a much reduced funding requirement.[8] In addition, extension of the plants' operating licenses by twenty years, as was

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[5] *RA-10*, p. 4, l. 10-13; *I/M/O the Petition of Public Service Electric and Gas Company's Deferral Filing Including Proposals in Rates for Its Non-Utility Transition Charge (NTC) and Its Societal Benefits Charge (SBC) for the Post-Transition Period*, BPU Docket No. ER02080604, OAL Docket No. PUC 7893-02.

[6] *I/M/O the Petition of Public Service Electric and Gas Company for Approval of an Increase in Electric and Gas Rates*, BRC Docket Nos. ER91111698J *et.al*. (Final Decision and Order dated Dec. 31, 1992), Revenue Requirement Stipulation, Attachment 3, p.10 (Response to data request S-PDEC-1, page 41).

[7] *RA-10*, p. 19, l. 18 to p. 20, l. 10.

[8] *Id*., p. 20, l. 10-13.

done for Peach Bottom and is very likely for Salem and Hope Creek, provides additional time for the decommissioning fund to grow and greatly reduces the contributions needed to accumulate the amount needed for decommissioning.

As stated by Mr. Dirmeier, in determining the surplus in the trust funds, it is necessary to allocate responsibility for decommissioning funding between past regulated ratepayers of PSE&G and future non-regulated customers of PSEG Power. Mr. Dirmeier further stated that the allocation should be based on what the fund balance should be at this time if decommissioning funding, over the entire life of the plants, were the same in each year, based on current estimates of decommissioning cost, cost escalation and the fund earning rate. In other words, the decommissioning cost responsibility per year for regulated ratepayers should be the same as the cost per year incurred during the future deregulated life of the plant.[9] Allocating a like amount per year for the entire lifetime of the plants will ensure that both past and future users of the plant will all pay a fair share of the estimated decommissioning costs based on how long they received the generation output of the plants. The format of the calculation was contained in Mr. Dirmeier's prefiled testimony (*RA-10*, pp. 16-19) and was later updated for more recent figures in his response to Transcript Request 468.

However, PSE&G witness, Mr. Busch, disagreed with Mr. Dirmeier's determination to use a *pro rata* method to calculate the current surplus. In his prefiled rebuttal testimony, Mr. Busch made several arguments for his position. *P-7*, pp. 12-15. As will be seen below, Mr. Busch's arguments fly

[9] *Id*., p. 16, l. 7-12.

in the face of any just and reasonable ratemaking for the decommissioning costs and should be rejected.[10]

Mr. Busch argues that "the radiological contamination that gives rise to the vast majority of the cost of decommissioning occurs shortly after a nuclear plant's initial operation." *Id.*, p. 12, l. 18-20. If the Board were to adopt Mr. Busch's argument, that would unfairly burden the first ratepayers who use the output of a nuclear plant to pay all the costs of decommissioning even after the plant was sold to another party and the output was used for another company's customers. In this way, the future customers would escape any responsibility to pay a fair share of the costs to decommission the plant whose output they enjoy. That would also reduce the cost of that output to the future customers and unfairly increase the cost to the past customers who no longer receive any electricity from the plant. That proposal is not based on just and reasonable ratemaking, but it is exactly what PSE&G would have the Board do. The Board should deny setting rates based on that unfair formula.

As stated by Mr. Dirmeier:

> The cost of funding the decommissioning of nuclear plants is like any other cost that is occurred at a single point in time but which provides benefits over many years. Such costs must be allocated over time to those who receive the benefits that flow from incurring the cost.

*RA-11*, p. 11, l. 20 to p. 12, l. 1.

A fair ratemaking policy would match the decommissioning cost responsibility as much as possible to the past and ongoing benefits of the plants' generation output, *i.e.*, including those customers

[10] However, as noted in Transcript Request 468, Mr. Dirmeier calculated that, even adopting Mr. Busch's argument, the funds would still have a surplus of $200.968 million, according to Mr. Busch's method. If the Board adopts PSE&G's method, then the Ratepayer Advocate urges the Board to order a refund of the $200.968 million plus the aforementioned $9.680 million for SBC payments from April 1, 2003 through July 31, 2003. The total refund in that event would be $210.648 million.

of the unregulated PSEG Power (or any later owners) who will enjoy the output in the future. PSE&G itself, as do all other nuclear plant owners, allocated the cost of decommissioning over time as the plants were used, when the plants were in regulated rate base. *Id.*, p. 12, l. 13-14. Now that the nuclear plants are owned by the unregulated affiliate who must compete with other electric suppliers for customers, PSE&G proposes on behalf of PSEG Power to allow the affiliate to set its prices for future customers without regard to a major cost of production, *i.e.*, decommissioning, and to continue to charge the full cost of decommissioning in the regulated, nonbypassable SBC. That proposal unfairly burdens the still-regulated utility customers and should be rejected.

Mr. Busch also argues that Mr. Dirmeier's *pro rata* allocation does not match one method commonly used by buyers of assets, *i.e.*, the net present value ("NPV") method. *P-7*, p. 13, l. 6-18. According to Mr. Busch, this method calculates the projected revenues and costs of owning an asset and then present-values those figures to today's dollars to determine a price to buy the asset. *Id*. Mr. Busch then says, "A buyer would not exclude the future costs of decommissioning because it is fair to the ratepayers or furthers the spirit of competition." *Id*. However, this is exactly what PSE&G would have the Board do – allow the buyer (PSEG Power) to ignore the future cost of decommissioning when the assets were transferred and make higher unregulated profits from this exclusion to the detriment of regulated utility customers. That is hardly the result contemplated in the *Restructuring Final Order* or in EDECA. The Ratepayer Advocate urges the Board to reject PSE&G's arguments and to adopt the equitable *pro rata* allocation method recommended by Mr. Dirmeier.

Furthermore, adopting PSE&G's recommendation to continue ratepayer funding of the nuclear decommissioning costs regardless of the fact that the ratepayers no longer are entitled to the output of

those plants would create another result that should be avoided. By relieving PSEG Power of any cost responsibility for decommissioning, the Board would give little if any incentive for the affiliate to save money or cut costs when decommissioning the plants. Because PSEG Power would feel free to spend all those decommissioning funds if it chose to do so, future cost cutting and efficiency in decommissioning tasks would be unnecessary from PSEG Power's perspective.

It is always easier to spend other people's funds than when your own funds are at risk. That would work to greatly diminish or even eliminate any possible refund to ratepayers in the future. Therefore, the Board should not consider continuing ratepayer funding for decommissioning with the idea that any future surplus could always be returned to customers. Such a ratemaking policy would make it likely that no money would be left for a refund. The Board should act to order a refund now. The record clearly shows an excess recovery of decommissioning costs has been charged to ratepayers. The Ratepayer Advocate respectfully submits that utility ratepayers are entitled to a refund of that excess in the amount of $331.497 million to be returned to them over the same amortization period the Board uses to return the other deferred balances overpayments.

## POINT V

### THE BOARD SHOULD FIND THAT PSEG WILL STILL RETAIN SIGNIFICANT FINANCIAL BENEFITS FROM THE FAS 143 GAIN EVEN AFTER THE REFUND TO RATEPAYERS IS MADE.

While PSE&G alleges financial harm from the Ratepayer Advocate's recommended refund and cessation of ratepayer funding of nuclear decommissioning,[11] it is undeniable that PSEG Power will enjoy an accounting gain from this cessation. As admitted by PSE&G witnesses, Mr. Busch and Mr. Furlong, in the first quarter of 2003 PSEG Power recorded an after-tax gain of $370 million, of which $244 million after-tax was due to the former PSE&G nuclear units. T341:L3-17; T406:L1-25; RAR-DECOM-51 (UPDATE 2). This gain was due to the accounting change for the obligation to decommission the plants that was required by the Financial Accounting Standards Board in its Statement of Financial Accounting Standard 143 ("FAS 143"). *Id.*; T212:L5 to T213:L15. The pre-tax effect of the $244 million after-tax gain would be $413 million. Therefore, even given the Ratepayer Advocate's recommended refund of $331.497 million, PSEG Power would still enjoy a gain of $81.503 million due to the Board's directive to cease charging the utility ratepayers for nuclear decommissioning ($413 million minus $331.497 million = $81.503 million). That is hardly a financial hardship.

PSE&G also mistakenly alleges that the Ratepayer Advocate argues that the refund must only come from PSE&G, the utility, and not from PSEG, the parent, or PSEG Power, the current unregulated owner of the nuclear units.[12] T243:L6-7. Although the refund would presumably be

[11] T243:L7-11.

[12] The utility also mistakenly raised the argument that the Ratepayer Advocate recommended that the refund be taken from the trust funds. *P*-7, p. 11, l. 2 to p. 12, l. 9. As explained in Mr. Dirmeier's testimony, that was never our

passed through the PSE&G customer bills, that is not to say that the money for the refund could not come from the parent or PSEG Power. The $331.497 million refund would effectively be $196 million after-tax. Although PSEG has reported 2002 earnings of $201 million for PSE&G, the parent also reported $468 million in 2002 earnings for PSEG Power.[13] These two subsidiaries of PSEG clearly show great earning power to be able to afford even a refund of the magnitude recommended here.

recommendation. *RA-11*, p. 8, l. 7-19.

[13] PSEG Form 8-k from January 2003, Attachment 3.

## CONCLUSION

For the reasons set forth above, and the reasons in the testimony of our witnesses, and supported by the substantial, credible evidence in the record, the Ratepayer Advocate respectfully submits that the Board should adopt the recommendations contained herein.

Respectfully submitted,

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By:_____
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Dated: June 16, 2003

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